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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 828

ROBERT L. WIXOM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert L. Wixom, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the United States District Court for the Eastern District of Illinois. The District Court, having tried the case without the intervention of a jury, found the Petitioner guilty of violating Section 453, Title 50 App. United States Code (Selective Service Act of 1948) in that he did neglect and refuse to register as required by the Act. (Tr. 86 & 87.) The judgment of the District Court was that Petitioner be sentenced to one year and one day, and that he

pay a fine of $100.00 and costs of the prosecution. (Tr. 86.) However, the execution of the prison sentence was suspended and he was admitted to probation for a period of three years, provided that he submits to registration within a period of 90 days. (Tr. 86-87.)

The Court of Appeals affirmed the judgment of the District Court on the authority of *United States of America* v. *Herman Francis Henderson, et al.*, decided by the same Court of Appeals on February 27, 1950. (Tr. 104.) The opinion of the Court of Appeals in the *Henderson* Case is hereto attached as Appendix I, following the brief herein.

STATEMENT OF MATTERS INVOLVED.

Petitioner is a birthright Quaker, descendant of a long line of Quakers, and is a member in good standing of the Religious Society of Friends. (Tr. 31-32.) He was born in Philadelphia in 1924. While he was a graduate-student of the University of Illinois at Urbana, and was a teaching fellow in the Chemistry Department of the same institution, he maintained his home address with his parents in Montclair, New Jersey. (Tr. 19 & 31.)

On the 31st day of August, 1949, and in accordance with the proclamation issued by the President of the United States pertaining to the Selective Service Act of 1948, petitioner was called upon to register for the draft. On that day he sent a letter (Tr. 37) to his Selective Service Board in Montclair, New Jersey together with a long statement (Tr. 37-43) setting forth why, in accordance with the religious concepts held by him as a Quaker, in accordance with the tenets of the Religious Society of Friends, he is unable to register. Petitioner's statement was accompanied by a letter from the Clerk of the Monthly Meeting of the Friends in Germantown, Pa., to which meeting he belonged. (Tr. 33, 46 & 47) This letter and others submitted in evidence on behalf of petitioner, evidenced that he received most of his education in schools maintained by the Religious Society of Friends, who, in accordance with his religious convictions, and under Divine compulsion, felt compelled to refuse registration. (Tr. 46) Petitioner's action is fully in keeping with the history and tradition of the Quaker faith, whose adherents for centuries have on occasion felt compelled to refuse to comply with man-made laws in obedience to what they have conceived to be the will of God. (Tr. 46-47)

Petitioner, during World War II, registered as a conscientious objector and was classified 4-E after his Draft Board found his objections to be sincere and in keeping with his religious training and belief. (Tr. 46) The government and the Trial Court agreed, on the basis of the evidence, that petitioner is a man of the best morals who because of his religious concepts honestly held, refused to submit to registration. (Tr. 48)

Petitioner filed his Motion to Dismiss the Information and an alternative Motion for Judgment to Acquit. (Tr. 10 & 11) The dismissal was urged on the ground that petitioner, a Quaker, prompted by reasons of conscience and religious belief against participation in any warlike effort, was protected by the First Amendment to the Constitution. Further he contended that the rule of "clear and present danger" may not interfere with his free exercise of his religion, since in peacetime his refusal to register for the draft causes no "imminent and substantial evil." Petitioner also contended that if the Act requires him, notwithstanding of his religious beliefs, to register for the draft, then the Act is unconstitutional. A further ground presented in support of the Motion to Dismiss was that petitioner, having addressed his letter to his Draft Board, in fact did everything that he was required to do since he thereby did "present himself" for registration and no further duty evolved on him. The technical registration was the duty of the Draft Board.

Petitioner, in the alternative, urged that he be acquitted on the grounds set forth in support of his Motion to Dismiss. (Tr. 11)

The Motion to Dismiss was denied and the Motion for Judgment to Acquit was taken under advisement by the Trial Court pending hearing on the merits of the case. (Tr. 13)

At the close of the government's case, petitioner moved for a Judgment to Acquit on the ground that there was no showing that he refused to submit to registration; (Tr. 26-27) that while there was showing that he failed to register in Champaign County, there was no showing that he failed to register in his own local jurisdiction in New Jersey. (Tr. 27-28) The Motion for Acquittal was denied. (Tr. 28) At the close of all the evidence, petitioner submitted the question of the constitutionality of the Act under which he was charged. The Trial Court found that the Act is Constitutional and further found that sincere religious belief as held by petitioner and his conscientious belief that warlike efforts are contrary to the command of the Lord, do not excuse him from registering, and, therefore he was found guilty. (Tr. 80-81) He was committed to the custody of the Attorney General for the period of one year and one day and to pay a fine of $100.00 and costs. The execution of the prison sentence, however, was suspended and the petitioner was placed on probation for a period of three years, provided that he, within 90 days, register. (Tr. 83) Petitioner did, as in the first instant during his trial and subsequently in the Court of Appeals, raise the following issues.

1. Petitioner as a member in good standing of the Religious Society of Friends, and who adheres to the religious tenets of the Quakers, cannot for reasons of conscience and of his religious beliefs participate in war or in preparation thereof in any form; his religious belief is protected by the First Amendment to the Constitution, which forbids Congress to restrict the free exercise of religion.

2. In the absence of "clear and present danger" creating "imminent and substantial evil" one's free exercise of religion is constitutionally protected. Petitioner's non-

registration in peacetime creates no "clear and present danger."

3. Petitioner, having written to his Draft Board setting forth his reasons why he cannot actively participate in registration, did thereby comply with the law in that he did in fact "present himself" for registration.

4. The Selective Service Act of 1948, if applied to require petitioner to register for the draft contrary to his religious beliefs, becomes constitutionally restrictive of the free exercise of religion.

5. The Trial Court erred in denying petitioner's Motion to Dismiss and his Motion for Judgment of Acquittal, which motions were bottomed on the issues presented above. The Trial Court also erred in not dismissing the Information at the close of the government's case since there was no proof of petitioner's violation of the law, and further erred in not entering a judgment of acquittal since petitioner was shown to have no intent to commit a criminal act, but rather he justly raised the question of the Constitutionality of the Act. (Tr. 91-93)

The Court of Appeals held on the authority of *United States of America* v. *Henderson, Wildman, Schuffelbarger and Franz,* (No. 9996, 9997, 9998 and 9999) that the Act involved was Constitutional and that it was constitutionally applied by the Trial Court. It also held that the First Amendment to the Constitution did not protect petitioner from the charge laid against him in the Information because Congress was given the right to "raise armies" and such congressional right is paramount to the Constitutional prohibition against making law that restricts the free exercise of religion. (Appendix I)

JURISDICTION.

Jurisdiction of this court is invoked under section 1254 U. S. C. A. (Judiciary and Judicial Procedure, Title 28, Chapter 646, Public Law 773—80th Congress)

The Judgment of the United States Court of Appeals, Seventh Circuit to be reviewed was entered on the 18th day of April 1950.

QUESTIONS PRESENTED.

1. Is the Selective Service Act of 1948, the violation of which was charged against the petitioner by the Information unconstitutional on the ground that:

A. It is violative of the rights secured by the First Amendment?

2. Can petitioner be found guilty of violating the Act in the absence of criminal intent; and when the evidence discloses that his refusal to register for the draft was based on his sincerely held religious beliefs; and when he, while refusing to register, raised a constitutional issue to test the extent to which the Act is applicable to him, notwithstanding the constitutional prohibition against laws restrictive of religious freedom?

REASONS FOR ALLOWANCE OF CERTIORARI.

1. *Petitioner's case raises important questions of Constitutional law, which as far as we know have not been, but should be settled by this Court.*

A. Petitioner, a birthright Quaker who sincerely adheres to the peaceful non-violent tenets of the Religious Society of Friends, did not,—because he could not,—for reasons of conscience, participate in any warlike efforts, and, therefore, refused to register for the draft. His refusal to register is within his free exercise of religion, which is guaranteed by the Constitution.

West Virginia State Board v. *Barnette,* 319 U. S. 624.

Girourard v. *United States,* 328 U. S. 61.

Declaration presented by George Fox and Others to Charles II.

McIntosh v. *United States,* 283 U. S. 631.

Schwimmer v. *United States,* 279 U. S. 644.

Amendment I, United States Constitution.

B. The rule of "clear and present danger" does not justify the abrogation of religious freedom protected by the Constitution.

Free Speech and Its Relation to Self Government, by Alexander Meiklejohn.

Bridges v. *California,* 314 U. S. 252.

C. If the Act, the violation of which is charged against petitioner, is interpreted that it requires him to register contrary to his religious beliefs, then the Act is unconstitutional.

Constitutionality of Peacetime Conscription, by Harrop Freeman, 31 West Va. Law Review, p. 40.

West Virginia State Board v. *Barnette,* 319 U. S. 624.
Kovacs v. *Cooper,* 69 S. Ct. 448; 336 U. S. 77.
Cantwell v. *Connecticut,* 310 U. S. 296.
In re Summers, 325 U. S. 561.
Minersville School District v. *Gobitis,* 310 U. S. 586.

D. Petitioner's letter to his Draft Board setting forth his religious reasons forbidding him to register satisfied the requirements of the Act.

Selective Service Act of 1948, Pars. 453.

2. In the absence of criminal intent, petitioner ought to be found not guilty.

Keegan v. *United States,* 325 U. S. 478.
Okamoto v. *United States,* 152 Fed. (2d) 905.

This court has never decided the all important question whether or not a person, as petitioner, who sincerely attempts to follow the command of the Lord, can be found guilty of a crime if he fails or refuses to perform a positive act demanded by a Congressional Law, and which act is in direct conflict with his belief as to the Law of God. We are well aware of the many decisions as to the right and duty of Congress to raise an army. However, those decisions all go to wartime conditions. Even then we believe that the question was never decided point-blank whether or not man-made law is superior or subordinate to the laws of God. Petitioner in the Trial Court, as well as in the Court of Appeals, submitted the issues clearly and without any ambiguity. Petitioner believes that this Court ought to decide whether or not he, following his religious conviction as he did all through his life, may be stamped a criminal as he was by the Trial Court, or that the Constitutional prohibition of restrictive laws directed

against religious practices be upheld. The restriction of religious freedom under all circumstances is abhorrent to the Constitution, and we believe that this Court will be quick to intervene and will hear this case so that a definitive answer may be given to the issues so clearly presented.

WHEREFORE: Petitioner prays that the Writ of Certiorari may issue out of and under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that Court to certify, on a day certain to be herein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 10051, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Seventh Circuit may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as may seem just and proper.

Respectfully submitted,

ROBERT L. WIXOM,
Petitioner,

By: FRANCIS HEISLER,
IRWIN J. ASKOW and
RICHARD JAMES STEVENS,
His Attorneys.

FRANCIS HEISLER,
Of Counsel.
Chicago, Illinois,
May 12, 1950.

BRIEF IN SUPPORT OF THE PETITION.

OPINION BELOW.

No opinion was issued from the United States Court of Appeals for the Seventh Circuit in this case No. 10051. However, the judgment of the District Court was affirmed on the authority of cause numbered 9996, 9997, 9998 and 9999—*United States of America* v. *Herman Francis Henderson, William Edwards Wildman, Richard H. Shufflebarger and Charles Frantz,* which cases were decided as a consolidated one by that Court on February 27, 1950. The opinion in those cases is printed herein as Appendix I.

JURISDICTION.

The grounds under which jurisdiction of this Court is invoked, are set forth in the Petition preceding this brief.

STATEMENT OF THE CASE.

The Statement of the Case appears in our Petition and is not repeated here.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in ruling against petitioner on each of the issues set forth in the Petition.

STATUTES INVOLVED.

The pertinent provisions of the 1948 Selective Service Act and the regulations thereunder are set forth at the end of this brief as Appendix II.

ARGUMENT.

A. Petitioner, a Birthright Quaker Who Sincerely Adheres to the Peaceful Non-Violent Tenets of the Religious Society of Friends, Did Not Because He Could Not, for Reasons of Conscience, Participate in Any Warlike Efforts, and, Therefore, Refused to Register for the Draft. His Refusal to Register Is Within His Free Exercise of Religion, Which Is Guaranteed by the Constitution.

B. The Rule of "Clear and Present Danger" Does Not Justify the Abrogation of Religious Freedom Protected by the Constitution.

The Court of Appeals in upholding the conviction of Petitioner, relied on *West Virginia State Board* v. *Barnette,* 319 U. S. 624. However, the reliance was placed not on the opinion of this Court as a whole, but rather on a footnote which states that "The nation may raise armies and compel citizens to give military service." Petitioner does not quarrel with this footnote statement—more particularly because the self same footnote also says that "* * * those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life." We believe that this Court did not and could not say that petitioner's basic right that is protected by the Constitution is one of those freedoms that may be taken away from him. That was not meant, because this Court stated that:

> "If there is any fixed star in our Constitutional Constellation, it is that *no official, high or petty, can prescribe* what shall be orthodox in politics, nationalism, *religion or other matters of opinion or force citizens*

to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis ours.)

The First Amendment and the protection extended to the free exercise of religion, means (if it means anything) that it protects religious acts. The members of the Religious Society of Friends and among them petitioner, believe and they so say that they must act in full compliance with the Commands of the Lord. As late as July 20-22 in 1948, a meeting called by representatives of the Quakers of the United States at Earlham College, Richmond, Indiana, stated that "Friends are exhorted to adhere faithfully to the testimony of George Fox." The testimony of George Fox was followed by the Quakers for close to 300 years. It stated:

> "We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretence whatever; this is our testimony to the whole world. The Spirit of Christ by which we are guided, is not changeable, so as once to command us from a thing as evil, and again to move us unto it; and we certainly know, and testify to the world, that the Spirit of Christ, which leads us unto all truth, will never move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ, or for the kingdoms of this world * * *. Therefore we cannot learn war any more."

The religious line adhered to by the Quakers was known by the framers of the Constitution and those who formulated the First Amendment. It must be assumed that the free exercise of religion protected by the First Amendment, which protection included the religious exercise by Quakers. The framers of the Constitution and those who thereafter carried out the provisions thereof, knew what the Quakers stood for and they without any exception recognized the Quakers' right to practice their belief as

best they knew how. A historical review of the writings of George Washington* recognized that a conflict may and sometimes exists between the Command of God and the command of man-made law. There is little doubt that the framers of the Constitution considered the latter subordinate to the former. The American Nation and the philosophy underlying the basic documents of our government has its roots in the Judeo-Christian philosophy and course of conduct emanating therefrom. Holding that one who as petitioner sincerely believes that he must live in accordance with the Command of the Lord, may criminally conflict with a man-made law involving his religious beliefs, would negate the basis of our government. We do not believe that this Court did at any time, or will now permit such an assumption.

The Court of Appeals in upholding the conviction of petitioner, takes the position that the understanding of the members of Congress as to the needs of National Defense from time to time is a paramount and exclusive determinant, to which all others, including the prohibitions contained in the First Amendment must yield. The conclusion is unavoidable that as against the wisdom of the members of Congress, the prohibition against restriction on religious freedom contained in the First Amendment, must take second place. We believe that this is an error so fundamental that it threatens to negate the whole of the Constitutional basis of this country's government. It is an error because it is an anomaly to believe that the rights originally belonging to the sovereign—that is the people—which were by positive words retained by the people: the restrictions which were positively placed upon Congress, may be disregarded and the powers may be taken and returned to the sovereign, at the pleasure of

* *The Quakers in Peace and War*, by Margaret Hirst. *Life of Lincoln*, Nicolay & Hay. *Memoir and Correspondence*, E. P. Gurney.

Congress. Such was not contemplated by those who wrote the Constitution, and particularly when they framed the First Amendment which said without any equivocation, that Congress shall make no laws "* * * restrictive of the free exercise of religion."

There is an **apparent** justification for the decision of the Court of Appeals in the precept of "clear and present danger." We do not believe that that precept ought to apply as a whole, and we further believe that if it is applied, it cannot apply to restrict religious freedom. So, it was proven by the clear exposé of Professor Alexander Meiklejohn in his book, *Free Speech* (Harper & Brothers, Publishers, 1948). Professor Meiklejohn, in analyzing and comparing the First and Fifteenth Amendments to the Constitution concludes that the intent was that the First Amendment provide an *unlimited guarantee of freedom* of speech and obviously of the free exercise of religion. He says that the First Amendment:

> "* * * correlating the freedom of speech in which it is interested with *the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation*—**beyond even the due process of law. With regard to them, Congress has no negative powers whatever.**"

Professor Meiklejohn, discussing the basis of the Constitution: namely, the compact between the people and the government,—concludes that the freedoms guaranteed by the First Amendment and the injunctions directed to Congress, are "The basic postulate of a society which is governed by the votes of its citizens."

It appears that we are almost ready to accept that the First Amendment does not mean what it says, and we are almost grateful that there is a certain limitation set on the power of Congress, as to the extent that our basic

freedoms may be restricted. We are almost ready to assume that Justice Holmes' winged phrase of "clear and present danger" is something generally accepted, when in fact Justice Holmes, its author himself, supported by Justice Brandeis, was clearly aware that putting a restriction on this restriction is not only needed but is required. While in the first instance the rule of "clear and present danger" was presented without any qualification, subsequent decisions added qualifying phrases agreeing that dangers in themselves do not justify the suppression of basic rights guaranteed by the First Amendment. The first judicial interpretation was that an emergency will justify the application of the "clear and present danger" rule. Subsequent qualifications went farther and stated that it may be applied only when the evil to be suppressed is grave, etc. [See Oliver Wendell Holmes, Collected Legal Papers (Harcourt, Brace and Howe, New York, 1920). See also Zechariah Chaffee, Jr., Free Speech in the United States (Harvard University Press, 1942) and see Myer Cohen, Selected Supreme Court Decisions (Harper & Bros., 1937)].

It is hard if not impossible to disagree with Professor Meiklejohn that accepting the "clear and present danger" theory means in effect that "The compact of self-government has been ignored or repudiated." (Opus Cited P. 89) It is hard if not impossible to disagree with him that the unabridged freedom guaranteed by the Constitutional Amendments, "is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any 'clear and present'—or even terrific danger." (Opus Cited P. 91)

We made it clear we believe, that we do, as did Justices Holmes and Brandeis, disagree with the "clear and present danger" theory. We may therefore go on assuming—without admitting it,—that such theory is Constitu-

tionally proper and justified. However, even with such assumption, it is clear that the defendant's right to free exercise of his religion, cannot be restricted in the instant case.

The rule of "clear and present danger" cannot in the case of petitioner deprive him of the protection of the First Amendment. It would be hard, if not impossible, to argue that his refusal to register is a circumstance that is to be an exception to the First Amendment because it represents a clear and present and grave danger to the state security. The rule is laid down by the Supreme Court of the United States in *Bridges* v. *California*, 314 U. S. 252, as follows:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

It is hard, if not impossible, to argue that petitioner's refusal to register is a substantive evil or that it is extremely serious, and that the degree of the imminence of the danger to the state is extremely high.

We submit that petitioner's refusal to register is clearly within the protection of the First Amendment, and, therefore, it was erroneous to find him guilty and it was further an error on the part of the Court of Appeals to affirm the conviction.

C. If the Act, the Violation of Which Is Charged Against Petitioner, Is Interpreted So That It Requires Him to Register Contrary to His Religious Beliefs, Then the Act Is Unconstitutional.

The petitioner was found, by the District Court, to be a person of confirmed moral and religious beliefs. In exercising his beliefs, which prompted him to be opposed to war and the war efforts in any form, he is Constitutionally protected, since the free exercise of religion cannot be forbidden by law.

In the case of *West Virginia State Board* v. *Barnette,* 319 U. S. 624, the protection of the First Amendment is extended to the right of the citizen to refuse to salute the American Flag, if such refusal is because of his religious practice. Because the phrase "civil disobedience" is apparently in the mind of some as an act not to be contemplated under any circumstances, it is proper to point out that the *Barnette* Case refers approvingly to the action of the early Quakers, who refused to doff their hats to civil authority—a refusal which in those days and under the circumstances was considered an act of civil disobedience.

In the case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, the Supreme Court upheld the right of individuals to colportage of religious pamphlets even though such distribution was charged against them as creating disturbance.

In the case of *Kovacs* v. *Cooper,* 69 S. Ct. 448, the Supreme Court gave an answer to those who wrongly claim that the First Amendment protects religious beliefs as long as those beliefs are not carried into practice, contrary to ordinances, statutes or regulations. In that case, the Supreme Court said that an ordinance which attempts "censorship of speech or religious practices before per-

mitting their exercise the Constitution forbids their enforcement." In this case, the practice and not only the belief was put under the protection of the First Amendment, and petitioner's practice of refusal on religious ground to participate in the draft even to the extent of registration is protected. It was said in the *Kovacs* Case, the Constitution forbids the enforcement of the law which attempts to interfere with or censor a religious practice.

In the case of *Cantwell* v. *Connecticut,* 310 U. S. 296, the Supreme Court upheld the right of members of Jehovah's Witnesses to play a victrola record which attacked Catholicism, even in streets where the majority of the people were Catholics, in which case the lower court felt that such act of the Jehovah's Witnesses was a provocation.

In the case of *Taylor* v. *Mississippi,* 319 U. S. 583, the right to distribute literature by pacifists directed against the draft law and against wars, was upheld.

The minority decision in the case of *Schwimmer* v. *United States,* 279 U. S. 644, is today the decision of the majority. Therefore, the minority opinion of Justice Holmes is pertinent. He said:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate * * * the Quakers have done their share to make the country what it is."

In the case of *MacIntosh* v. *United States,* 283 U. S. 631, the minority opinion is now becoming adopted by the majority. There Chief Justice Hughes said:

> "* * * the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning who have been unwilling to sacrifice their religious convictions, and in particular,

those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be allegiance to the will of God * * *."

The minority opinion in the case of *In Re Summers*, 325 U. S. 561, may be also cited, since we submit that the minority opinion of four justices therein is now supported by the majority in the case of *Girourard* v. *United States*, 328 U. S. 61. In this latter case the court said:

"* * * The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States* v. *Ballard*, 322 U. S. 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U. S. 624'."

Petitioner's position is clearly covered by the dissenting opinion of Chief Justice Stone in the *Minersville School District* v. *Gobitis*, 310 U. S. 586, where it was said:

"I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties * * *. The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit * * *. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression * * *. The very essence of the liberty which they guaranty is the freedom of the individual from the compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If

> these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion. This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."

Assuming the constitutionality of the Selective Service Act of 1948, it must be held that petitioner was not required thereunder to act contrary to his basic religious concepts and convictions.

D. Petitioner's Letter to His Draft Board Setting Forth His Religious Reasons Forbidding Him to Register Satisfied the Requirements of the Act.

Paragraph 453 of the Act (Appendix II hereof) makes it a duty of certain male citizens to register. Proclamation No. 2799 of the President (Appendix II following this brief) sets forth the method of registration. However, the selfsame Proclamation in paragraph four thereof states:

> "* * * all local boards which, and agents thereof who may be appointed under the provisions of title I of the Selective Service Act of 1948, or the regulations which may be prescribed thereunder, to do and perform all acts and services necessary to accomplish effective and complete registration."

It is clear from the Proclamation that "All acts and services necessary to accomplish effective and complete registration" are performed by the local draft boards, or agents thereof and that upon the petitioner rested no further duty but to present himself to his local board. This the petitioner did, and therefore he ought to be found not guilty.

2. In the Absence of Criminal Intent Petitioner Ought to Be Found Not Guilty.

The Trial Court repeatedly found that the action of the Petitioner in refusing to register, is based on his honest and sincere religious belief. (Tr. 35, 47, 48) The Court found that the defendant acted in accordance with the concept laid down by his religious faith. (Tr. 66, 74, 80-83) As a matter of fact, the Trial Court repeatedly stated that no one questions that the defendant honestly believes that he was doing what he considered morally right. There was no question in the mind of the Trial Judge that the petitioner acted as he did because he was compelled to do so by the Command of the Lord—a power beyond man, and therefore beyond the petitioner.

In accordance with the elementary law, it is accepted that a person who is not a free agent to choose between morally right and morally wrong, and if he then chooses to act on what is called morally wrong, nevertheless, he is not a criminal. We do not intend to agree with the Trial Judge that the petitioner chose to act in accordance with a precept that is morally wrong. To the contrary, our argument was and is that the United States Government in filing the Information, and the Trial Judge in ruling as he did, interpreted the Constitution along a line that is morally wrong. Assuming, however, for the sake of argument that the petitioner's course of conduct was along the wrong lines, even then, since he did so because he was compelled by a power beyond human beings, because he obeyed the Command of the Lord, therefore he was not a free agent, and lacked criminal intent and, therefore, he cannot be found guilty. One cannot (with the exception of certain specific laws) be guilty of a criminal act in the absence of a criminal intent. In the instant case, the government failed to show any criminal intent,

but to the contrary, the evidence disclosed that there was a total absence of such intent on the part of the defendant. For the lack of proof of a criminal intent, the defendant should have been acquitted on the basis of *Keegan* v. *United States,* 325 U. S. 478, and other cases:

> "One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the laws shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counseling, stealthily and by guile, to evade its command."

We submit that on the basis of the above decision and also on the basis of *Okamoto* v. *United States,* 152 Fed. 2d 905, petitioner lacking criminal intent and further honestly believing the application of the Act to him to be unconstitutional, was entitled to a judgment of acquittal.

Conclusion.

We submit that both the legal and the social implications of this case require that this Court grant a Writ of Certiorari, and upon hearing of the issues, make its decision known.

Respectfully submitted,

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FRANCIS HEISLER,
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Chicago, Illinois,

May 12, 1950.

APPENDIX I.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

OCTOBER TERM, 1949, JANUARY SESSION, 1950.

No. 9996
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
HERMAN FRANCIS HENDERSON,
Defendant-Appellant,
No. 9997
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
WILLIAM EDWARDS WILDMAN,
Defendant-Appellant,
No. 9998
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
RICHARD H. SHUFFLEBARGER,
Defendant-Appellant,
No. 9999
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
CHARLES FRANTZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

February 27, 1950.

Before KERNER, FINNEGAN and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* Each of the above named defendants was charged, either by indictment or information, with having unlawfully, knowingly, and wilfully failed and re-

fused to present himself for, and submit to registration before a duly authorized registration official or local selective service board, all as required of him by the Selective Service Act of 1948, 50 U.S.C.A. App. (1949 Supp.) §§ 451-470, a Proclamation of the President of the United States, issued and promulgated thereunder July 20, 1948, and Selective Service Regulations duly issued pursuant to said Act and then in full force and effect, all as the defendant then and there well knew. Three of the defendants were tried by a jury and one by the Court. All were found guilty as charged, sentenced to imprisonment for ninety days and fined $100.00. Since all four cases present the same questions, defendants' attorneys have stipulated with the United States Attorney that the four cases should be consolidated for the purposes of this appeal.

In appellant's brief it was alleged that the trial court had not conducted the trial in such a manner as to result in a fair trial to the defendants. In the argument before this Court, however, counsel for the defendants stated that they were not urging this as a ground for reversal, and we shall, therefore, not further consider it.

The defendants contend that because of their religious beliefs, their rights under the First Amendment would be violated if they were required to comply with the Selective Service law by registering thereunder. Three of the defendants are members of the Society of Friends (Quaker) and affiliated organizations. They profess to believe, and their sincerity is not questioned that war is never justified and that since registration is in aid of war it is likewise wrong. The fourth defendant professed the same belief, although not a member of any church.

Each of the defendants admitted that he was familiar with and understood the requirements of the Act as to registration, but insisted he would not register because of his religious beliefs. At the time for registration under the Act, each of the defendants, instead of appearing in person, wrote a letter to the local board explaining that he was opposed to war and conscription and did not intend to register; and each indicated that he was willing to accept the consequences of disobedience. Thereafter, they were in-

terrogated by a special agent of the Federal Bureau of Investigation. In these interviews each stated that he could have registered, but that he did not register at any time or place under the Selective Service Act of 1948; and each again stated that he did not intend to register due to his religious beliefs.

The letters written by the defendants illustrate their attitudes.

Defendant Wildman, in his letter to his local board said, "I feel that conscription for military service is wrong and I must protest it by refusing to register. I do this only after a great deal of thought, for I realize that going against the law may have serious implications."

The Defendant Shufflebarger said in a letter to his local board that he felt that he could not comply with the Selective Service Act of 1948 (requiring registration). Although he did submit to registration under the Selective Service Act of 1940, he explained that, "I now feel that I cannot accept conscription even by the token of registration for selective service."

Defendant Henderson in a letter to the local board said, "I cannot register for military draft. Not only am I unwilling to take military training myself, but I am also unwilling for my country to have a law requiring military training for its youth. I must protest against that law. Of course, I believe in government. If I must disobey a law, I must be willing to accept the consequences of disobedience, as set forth in the law."

The defendant Frantz wrote a letter to his local draft board inclosing a copy of his letter to the President of the United States and saying, "I regret there is no place in the present Act in which I can give my cooperation." In his letter to the President, Frantz explained his membership in the Society of Friends; stated that he did not believe in war, nor preparation for war; stated that registration is a recognition of the government's right to conscript for war and is wrong, because war is wrong; and said that he could not be consistent with his belief and acknowledge the right of the government to conscript, "an admission I would be making if I should register."

Section 3 of the 1948 Selective Service Act, 50 U.S.C.A. App. (1949 Supp.) § 453, provides that:

> "* * * it shall be the duty of every male citizen of the United States * * * who, on the day or days fixed * * * is between the ages of 18 and 26, to present himself for and submit to registration * * *."

Section 12 of the Act, 50 U.S.C.A. App. (1949 Supp.) § 462, defines offenses under the Act and provides penalties therefor. It provides that:

> "* * * any person who shall knowingly make * * * any false statement or certificate regarding or bearing upon a classification * * * or who otherwise evades or refuses registration * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under (the Act) * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment * * *."

The defendants contend that the 1948 Selective Service Act is unconstitutional. They impliedly admit, as they must, that it is within the power of Congress to enact a selective service or draft law in time of war, *Selective Draft Law Cases,* 245 U. S. 366, but contend that Congress may not exercise such power in time of peace. Both reason and the decided cases are against this contention of the defendants.

Congress was expressly given the power "To raise and support Armies * * *." U. S. Const., Art. I, Sec. 8, Cl. 12. This is an unqualified power given to Congress in order that it may protect the very existence of government. There is neither express nor implied limitation in the Constitution to this power. If, as contended by defendants, Congress could only exercise this power to conscript and train men when the country is at war, such action might then be unavailing, because it would come too late. To successfully fight modern war an army must be equipped with modern implements of war and be thoroughly trained in their use.

This cannot be accomplished in a short time. One of the stated purposes of our Constitution was to "provide for the common defense." It is fundamental that a nation must have the power to defend itself against enemies, both actual and threatened. Peace-time selective service acts have been held constitutional in *United States* v. *Lambert,* 3 Cir., 123 F. 2d 395; *United States* v. *Lamothe,* 2 Cir., 152 F. 2d 340; *United States* v. *Rappeport,* 36 F. Supp. 915, aff'd. in *United States* v. *Herling,* 2 Cir., 120 F. 2d 236.

The principal contention of the defendants is that the Act is unconstitutional as applied to them in that their religious belief, being contrary to war and even contrary to registering under a selective service act, which is, or may be, in aid of war, is protected by the First Amendment to the Constitution to the extent that they were not required by the Selective Service Act of 1948 to present themselves for, and submit to registration. Consequently, they contend that their right to exercise religious freedom cannot be abrogated by requiring their obedience to the Act. It is our opinion that the defendants have neither reason, nor authority, to sustain this contention.

The Constitution, Art. I, Sec. 8, after giving Congress various powers, including the power to raise armies, expressly gives Congress the power:

> "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." U. S. Const., Art. I, Sec. 8, Cl. 18.

To raise an army Congress must necessarily have the power to take an inventory of and to classify the available manpower of the nation. This is all that registration under the Act actually amounted to, so far as these defendants were concerned. All of the defendants admitted that they were familiar with the provision of the Act by which the local boards were empowered to defer them on account of their religious beliefs. One of them was past the age at which he would have been required to serve under the Act. Their only excuse for noncompliance with the registration provisions of the Act was that they were compelled by their religious belief to refuse to comply. If the law were to be considered applicable only to those men who have no scru-

ples against registering, the inventory of manpower so taken would be of little value. However, the defendants insist that "A person whose religion holds that all war and preparation for war, including registration for a selective service law, are evil, cannot be found guilty of a crime for carrying out his religion by refusing to do any affirmative act toward registration." This conclusion was reached by the argument that the First Amendment guarantees to each person the free exercise of religion; that the free exercise of religion means that each individual must be free to do or not to do any act solely according to the promptings of his personal conscience; and that this guarantee of freedom is absolute, except in cases where the religion of the individual impels him to do an affirmative act which "is contrary to the basic Judeo-Christian ethic of our society," or is such an act as to result in harm to a specific person other than the state.

In support of this theory the defendants rely principally on three cases, *Thomas* v. *Collins*, 323 U. S. 516; *Board of Education* v. *Barnette*, 319 U. S. 624; and *Girouard* v. *United States*, 328 U. S. 61. In *Thomas* v. *Collins*, *supra*, the Supreme Court held that an official representative of a labor organization could not be held guilty of contempt of court for failing to obey a court order which enjoined him from making a speech or soliciting memberships in his union until he had registered for, and been issued, an organizer's card, pursuant to a Texas statute; that the statute and the court order constituted an unreasonable and illegal restraint on freedom of speech and assembly. The Supreme Court said, p. 529:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins."

After discussing the importance and sanctity of the individual freedoms, the Court continued, p. 530:

> "For these reasons any attempt to restrict those liberties (liberties guaranteed by the First Amendment) must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

In this statement the Supreme Court recognized that the freedoms guaranteed by the First Amendement must yield when the public interest is threatened by a clear and present danger.

In *Girouard* v. *United States, supra,* the Supreme Court held that an alien seeking naturalization, and willing to take an oath that he would support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, was entitled to citizenship, even though he stated in his application that, because of his religious belief, he would not be willing to take up arms in defense of this country. The Court there was interpreting an Act of Congress and was not considering the question of religious freedom, as guaranteed by the First Amendment, excusing a citizen from military service or from the obligation of registering, pursuant to a selective service act. In the course of the opinion it was pointed out that religious scruples against bearing arms have been recognized by Congress in the various draft laws, and that Congress has recognized that "one may adequately discharge his obligations as a citizen by rendering non-combatant as well as combatant services * * * even in time of war one may truly support and defend our institutions though he stops short of using weapons of war." We find in this opinion recognition of the fact that Congress may excuse a citizen, because of religious beliefs, from bearing arms, and be satisfied with non-combatant service. The Court did not say that the First Amendment to the Constitution would prevent a conscientious objector from being conscripted or from being required to render combatant service.

In *Board of Education* v. *Barnette, supra,* the Court held that members of Jehovah's Witnesses could not be required to comply with a regulation of the West Virginia State Board of Education, adopted under authority of a State statute, that required all teachers and pupils to salute the American flag as a regular part of the program of activities in the public schools. The regulation also provided that a refusal to comply should be regarded as an act of insubordination and dealt with accordingly. The Court

after pointing out that failure to comply there was harmless to others and to the State, continued, p. 642:

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The defendants lay great stress on this statement but in a footnote to this statement the Court added the following:

> "The nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases,* 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."

By this footnote the Court clearly indicated that the individual's right to religious freedom must yield to his duty to render military service to the Nation if his service is needed.

It is true that each of the draft laws, including the Selective Service Act of 1948, has taken notice of the fact that we have citizens with the religious belief that war, and participation in war, is wrong, and each of these draft laws has made provision that those having such religious beliefs might be assigned to non-combatant service. The 1948 Selective Service Act goes even further and excuses them from non-combatant service if the local board finds that even that service would be against their religious scruples.

It seems that this recognition by Congress of the religious beliefs of some of our citizens has been interpreted by them as an admission that the religious freedom guaranteed by the First Amendment excuses them from par-

ticipation, of any kind, in war or the preparation for war. With this interpretation we cannot agree. If this Nation were successfully attacked and conquered by enemies from without, or within, none of us would have the rights guaranteed to us by the First Amendment. It is this Constitution which gave us these rights, and it is the Government set up by this Constitution which has jealously protected these rights for us since the birth of this Nation.

To guarantee the survival of this Government for the protection of these rights the Constitution gave Congress the right to raise armies. To raise armies they must necessarily call on the manpower of this Nation. The power to call on only those who were willing to fight could not have been the intention of the framers of the Constitution. A nation engaged in war is fighting for its existence. The framers of the Constitution intended that Congress should have the power, if necessary, to call on *every* citizen to come to its aid. In these days of total war, war means just what that name implies, a war of all, as a unit, for the preservation of our Nation, our ideals and our freedoms. As said by the Supreme Court in the *Selective Draft Law Cases, supra,* p. 161:

> "* * * a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power."

It is equally evident that the need for raising an army must be a question to be left to the final decision of Congress. It would be hard to conceive of our being engaged in any war to which there would not be some objectors, conscientious or otherwise; where some of our citizens would think the war not justified, who would think the declaration of war and the waging of war unnecessary. If the question of the necessity of war or the preparation for war were to be left to the answer of the courts on the petition of individuals, instead of to Congress, the war might well be over and our guaranteed freedom something only to be remembered before Congress could act and raise an army. *Selective Draft Law Cases,* 245 U. S. 366; *United States* v. *Mroz,* 7 Cir., 136 F. 2d 221; *Heflin* v.

Sanford, 5 Cir., 142 F. 2d 798, 800; *Roodenko* v. *United States,* 10 Cir., 147 F. 2d 752, cert. denied, 324 U. S. 860; *United States* v. *Lamothe,* 152 F. 2d 340; *Warren* v. *United States,* 10 Cir., 177 F. 2d 596; *Gara* v. *United States,* 6 Cir., 178 F. 2d 38; see also *United States* v. *Norton,* 2 Cir., ... F. 2d .....

The final argument of the defendants is that none of the defendants had the criminal intent, which was necessary to a conviction. This argument scarcely deserves our consideration. Each of these defendants was a mature, young man, educated and intelligent. Each understood the law and what it required of him. Each deliberately decided not to meet its requirements, knowing that penalties were provided for non-compliance, and that such penalties might be meted out to him. As this Court said in *United States* v. *Mroz, supra,* p. 226:

> "Appellant's clear and unqualified duty was to comply with his draft board's order. He can not 'take the law into his own hands' and render himself invulnerable to consequences. The draft machinery has been legally set up, and it is not for the individual to constitute himself judge of his own case."

Each defendant here intended to, and did, deliberately violate the Act. That is sufficient to support his conviction. The defendants are fortunate that the District Court did not impose more severe penalties.

The judgments of the District Court are affirmed.

APPENDIX II.

SELECTIVE SERVICE ACT OF 1948.

The Act, paragraph 453 thereof, sets forth:

"* * * it shall be the duty of every male citizen of the United States * * * who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

PROCLAMATION No. 2799 OF THE PRESIDENT.

"* * * is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days."